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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

WILLIAM RANDT, Plaintiff and Appellant, v. COLLIN LAM et al., Defendants and Respondents.	A151062 (San Francisco City and County Super. Ct. No. CGC-15-547092)

Appellant William Randt was evicted from an apartment in San Francisco by new owners of the building who served him with notice of their intent to move into the unit he occupied. He sued, along with tenants who had been evicted from another unit in the building, and the jury returned a verdict in favor of the landlords. Randt contends the trial court erred in denying his motion for new trial based on juror misconduct, in refusing to give a requested jury instruction, in several evidentiary rulings, and in its award of attorney fees to the landlords. We affirm.

BACKGROUND

In June 2014, respondents Collin Lam and Kimberly Wong purchased the four-unit building at 4441 Balboa Street in San Francisco. The building was subject to the San Francisco Residential Rent Stabilization and Arbitration Ordinance (Rent Ordinance) (codified as S.F. Admin. Code, ch. 37), and tenants occupied each of the four units. William Randt had lived in unit 2 since August 2008, and paid $1,370.18 per month in rent. Nicole DeLisi had lived in unit 1 since September 2013, and paid $1,455 per month

in rent; Leon Pitre had moved into the unit with her in January 2014. Unit 3 was occupied by George Chan, and unit 4 by tenants who held protected status under the Rent Ordinance and paid monthly rent of $779.47. Lam sent the tenants a letter introducing himself as the new owner of the building and requesting that rent payments be sent to his address at 279 11th Avenue.

On June 18, 2014, Lam served Randt with a "60 Day Notice of Termination of Tenancy" pursuant to section 37.9, subdivision (a)(8) of the Rent Ordinance,[1] so that respondents could move into unit 2.

On August 1, 2014, Chan gave notice of his intent to vacate unit 3. Randt asked Lam to rescind his eviction, but Lam declined. Randt moved out of the building on August 4, and Chan moved out on August 25. After Chan left, Lam painted and refinished the wood floor of unit 3 and in mid-September, rented it for more than the rent Chan had been paying.

In September 2014, DeLisi's rent check bounced and Lam had her served with a 30-day notice to pay rent or quit. DeLisi testified that Lam had verbally agreed she could pay her September rent with her October rent because she was not going to be paid until the end of September. DeLisi paid the owed rent and Lam rescinded the notice. Shortly thereafter, Lam asked DeLisi if she was thinking about moving out and she said she was not. On September 30, 2014, Lam gave DeLisi notice of a rent increase to $1,469.55, effective November 1, 2014, pursuant to the Rent Ordinance.

Respondents remodeled unit 2, making the one-bedroom, one-bath, apartment into a two-bedroom, two-bath, in anticipation of having a family. Lam informed the tenants by letter dated October 1, 2014, that construction would begin the next day for a remodeling project in unit 2, with a target completion date of December 2014. The letter stated, "Kimi and I look forward to becoming your neighbors before the end of the year!" The contractor's work took six to eight weeks, finishing at the end of November.

[1] Further references to "section" or "sections" will be to the San Francisco Administrative Code where not otherwise specified.

Lam and Wong testified that they moved into unit 2 in December 2014. As will be described, appellant presented evidence suggesting respondents did not move in until July 2015 or later.

On June 11, 2015, DeLisi and Pitre were served with a 60-day notice of termination of tenancy stating respondents intention to have Wong's brother, Jordan Wong, move into the unit. DeLisi and Pitre investigated their rights and learned that the owner was supposed be living in the building in order to evict them for a relative move-in. They believed respondents were not living in the building when the eviction notice was served and, therefore, the eviction was unlawful. They did not move out. DeLisi contacted Randt, and she, Pitre and Randt filed the present lawsuit against defendants on July 29, 2015. On August 12, 2015, Lam and Wong filed an unlawful detainer action against DeLisi and Pitre, which ended with a settlement in October 2015 that allowed Pitre and DeLisi to remain in unit 1 until July 2016.

Trial in the present case began on July 26, 2016. Alleging claims for violation of the owner move-in and relative move-in provisions of the Rent Ordinance, intentional infliction of emotional distress and intentional misrepresentation, appellant's theory was that both respondents' own move into unit 2 and Jordan Wong's move into unit 1 were actually motivated by respondents' desire to recover possession of the apartments from the rent-controlled tenants in order to rent them at market rates in the future.[2]

Respondents testified that they had been raised in the Richmond District and wanted to live near family. Wong's parents live at 9th Avenue and Balboa, about 30 blocks from the building Lam and Wong purchased, and Lam had aunts and a grandmother living at 23rd Avenue, 33rd Avenue and 38th Avenue. Respondents had tried unsuccessfully to buy a single family home in the Richmond in 2008. They had previously lived in an apartment at 279 11th Avenue, a building in which some of Wong's relatives lived that was two blocks from Wong's parents' house, then bought a condominium on Folsom Street where they lived from 2010 to 2014. When they

[2] The case was dismissed as to Jordan Wong during trial, on August 1, 2016,

purchased the Balboa building, they were living in a different apartment in the building at 279 11th Avenue, having moved back in order to live close to Wong's parents. A tenant rented the condominium, but respondents kept a parking space at the Folsom Street building and a key fob for the building. Wong learned about the Balboa building after Lam made an offer on it.

Lam testified that respondents chose to move into unit 2 because a ground-floor unit would be easier to manage with groceries and a baby and for grandmothers to visit, and because this apartment had two storage units. When they moved in, respondents covered the windows of the apartment with newspaper because they realized they were "exposed." The newspaper remained until at least August 2015 or, according to some evidence, at least November 2015.[3] Wong testified that the newspapers did not bother her because she preferred to be more "covered than exposed," and that they eventually replaced the newspaper with temporary paper blinds because it came to her attention that "others were concerned" about the newspapers and she was not ready to decide on permanent window fixtures.

Respondents' evidence of their move-in date included a receipt for rental of a U-Haul on December 7, 2014, a date-stamped photograph of relatives dismantling a large bed frame to get it through the door, and the testimony of Wong's cousin and uncle, who helped with the move. Lam testified that their Comcast account was transferred from 11th Avenue to Balboa the day they moved in, and a friend of Wong's brother who moved into the 11th Avenue apartment respondents vacated, testified that he did so on December 15, 2014.

Other evidence respondents presented to show they were living in unit 2 included Lam telling the tenants they could leave rent checks on the door of the apartment instead

[3] DeLisi and Pitre testified that the newspaper came down in August 2015, and Wong testified that it came down "a year ago," which would have been August 2015. Wong also testified, however, that respondents lived in the apartment with newspaper on the windows for "[a]lmost a year," and Randt testified that a photograph of the windows covered with newspaper was sent to him by a friend in November 2015.

of mailing them, and DeLisi paying her rent this way after December 2014. Lam signed for a Christmas card Randt sent by registered mail to the Balboa unit (which Randt acknowledged doing as a test, to see if anyone would sign for it). Lam described a time in March 2015, when he "ran down" and moved his car in response to a text from DeLisi and Pitre saying the car was blocking their garage; on April 7, Lam received a text from DeLisi about Pitre being locked out of their apartment, but by the time Lam received the text, it had "sorted itself out." Lam testified that his car was registered in January 2015 with the Balboa address. A photograph showed Wong inside unit 2, taking a photograph of herself in a bridesmaid's dress for a January 2015 wedding. Uber receipts showed that Lam was picked up from 4441 Balboa at 5:30 or 6:00 a.m. on March 24, 2015, to go to the San Francisco International Airport, and picked up from the airport at 11:21 p.m. on April 3, 2015, and taken to 4441 Balboa. A May 30, 2015 receipt showed a ride leaving San Carlos Airport at 10:00 a.m. and arriving at Balboa Street at 10:35 a.m.

Randt testified that after moving out of unit 2, he passed by on his way to visit friends, surf, or go to businesses he continued to frequent, and noticed that his old apartment "sat vacated," with newspaper on the windows. This made him feel disheartened at first, then infuriated, as he felt he had been "taken advantage of."[4]

DeLisi, whose unit was across the hall from unit 2, testified that she did not see anyone living in unit 2 during the first half of 2015. She did not hear any sounds from the apartment or see lights in the living room area, but a light in the pantry was always on, "24/7." DeLisi testified that she saw Lam around the building a few times a month

[4] The Balboa location was significant to Randt, as it was close to the beach and he surfed frequently. He had friends in the building and the neighborhood, and had no intention of leaving his apartment "any time soon." Upon his eviction, Randt initially moved to a shared living situation in San Francisco, then in April 2015, moved to Oakland, where he lived with his girlfriend and their twins, who were almost 11 months old at the time of trial. He and his girlfriend had discussed having her move into his apartment, and Randt testified that he could see raising his family there. Randt, and several other witnesses, described Randt being very upset and depressed after the eviction at the loss of proximity to the beach and tightknit surfing community there.

but did not see Wong much, and that she occasionally saw Lam walking his dog but never heard him inside the residence or saw the garage door for the unit being opened and closed. Pitre testified that he "knew" defendants were not living at 4441 Balboa during the first six months of 2015. He rarely saw Wong at the property and would see Lam "checking on things," sometimes with an older gentleman, and occasionally walking the dog late at night, but not staying overnight. Randt, and others who had lived in the building or visited, testified that sounds such as voices from other apartments could be heard easily from inside an apartment or and in the hallway [5]

DeLisi and Pitre moved out of unit 1 on July 19, 2016. Jordan Wong and his girlfriend Danilee Boozer moved into that apartment on August 1, 2016. According to the evidence at trial, prior to the notice of eviction being served on Pitre and DeLisi, and at the time of his October 2015 deposition, Jordan Wong did not know anything about unit 1, its layout, how many bedrooms it had, or when he would be moving into it, and at the time of trial, he had not discussed with Lam whether he would be paying rent; he had enjoyed living in the apartment he and Boozer had previously occupied, which had a "sunset view," was a rent-controlled apartment and had parking; and as late as April 2016, he and Boozer had discussed moving elsewhere for "a pretty solid job opportunity . . . possibly in the near future."

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[5] Randt testified that within the building at 4441 Balboa, one could hear sounds from other apartments like dogs and people talking, even snoring and coughing; from the hallway, one could hear the showers in the apartments. Patrick Porter, a friend of Randt's who had lived in unit 1 until 2012, testified that when he lived there he could hear raised voices in other apartments, people coming and going, garage doors opening and closing, and dogs barking. Another friend of Randt's who spent a lot of time at Randt's apartment testified that he could hear voices from other apartments from Randt's unit.

Some of respondents' testimony appeared to offer explanations why they were not seen or heard much at the building. For example, Lam testified that after moving into unit 2, when he and Wong were both going to be out, they took their dog to Wong's parents' house for dogsitting. They ate dinner at Wong's parents' house "almost every other night" and visited there as "pretty much a daily routine." At home, they had a rule that people were to take off their shoes inside the unit. Both Lam and Wong testified that they tried to keep their dog away from DeLisi and Pitre's dog.

The jury returned a special verdict in respondents' favor, finding that they sought to recover possession of unit 2 in good faith, without ulterior reasons and with honest intent, for their use or occupancy as their principal residence for a period of at least 36 continuous months.[6] The trial court awarded respondents $51,318 in attorney fees and $19,279 in costs as to Randt, and entered an amended judgment in favor of appellants DeLisi and Pitre in the amount of $70,597.

The jury found in favor of DeLisi and Pitre with respect to their eviction from unit 1. DeLisi ultimately obtained a judgment in the amount of $462,450.62 (damages of $120,000 awarded by the jury, trebled pursuant to section 37.9, subdivision (f), plus 93,557.19 in attorney fees and $8,893.43 in costs).

Randt's motion for a new trial was denied.

DISCUSSION

I.

Randt argues that the trial court erred in denying his motion for new trial based on juror misconduct. In support of the motion, Randt offered declarations from two jurors, each of whom stated that during deliberations, other jurors, who were Asian, made

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[6] On the question whether respondents sought to recover possession in good faith, without ulterior reasons and with honest intent, for their use or occupancy as their principal residence for a period of at least 36 continuous months, nine jurors answered "yes," two were undecided and one said "no." On the question whether respondents' dominant motive was to recover possession for their use or occupancy as their principal residence for at least 36 continuous months, nine jurors said "yes," one was undecided and two said "no."

Despite these findings rejecting respondents' liability, the verdict form the jury initially returned awarded damages to Randt for emotional distress. The jury was given clarifying instructions to answer the question on damages only if it had given specified answers to questions on liability, and then returned a verdict that did not assign damages.

There had also been an issue with the verdict forms for co-plaintiffs DeLisi and Pitre in that the verdict form for DeLisi as initially returned reflected what should have been Pitre's damages. The jurors stopped the clerk from reading the verdict when they realized this, and the jury was directed to review and ensure all the verdict forms were correct.

comments based on their personal knowledge and understanding of the Asian community about the newspapers on the windows of unit 2 after Randt moved out. One declaration stated that two jurors of Asian descent said "it's not unusual for Asian locations, especially businesses, to have newspapers upon the windows for any period of time" and that they thought "it would therefore not be unusual to live at the property while the newspaper was up." The other declaration stated that one juror of Asian descent said "that in certain Asian communities . . . it was common to have newspapers covering the windows, and therefore that it was not evidence as to whether the [respondents] lived in the unit."

Randt argues that the jurors who were described in the declarations engaged in misconduct by discussing outside evidence during deliberations. He points out that no evidence was presented at trial concerning cultural norms with respect to the use of newspaper to cover windows; respondents testified only that they put up the newspaper for privacy. The inferences to be drawn from the newspaper on the windows of unit 2 were important to Randt's case because he relied upon the newspaper-covered windows as evidence that respondents were not living in the unit. The trial court found no juror misconduct, viewing the statements described in the declarations as "mere expressions of opinions informed by the jurors' life experiences regarding evidence that was presented that was subject to varying interpretations."

"A juror may commit misconduct by receiving or proffering to other jurors information about the case that was not received in evidence at trial." (*In re Lucas* (2004) 33 Cal.4th 682, 696.) "However, a distinction must be drawn between the introduction of new facts and a juror's reliance on his or her life experience when *evaluating* evidence." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 76 (*Allen and Johnson*).) " 'Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim

to expertise or specialized knowledge of a matter at issue is misconduct. [Citations.]' " (*Ibid.*, quoting *In re Malone* (1996) 12 Cal.4th 935, 963, 50.)

In *Allen and Johnson*, a witness who claimed to have been near the scene of a shooting and identified one of the defendants as the shooter was impeached with evidence that his employment timecard showed he was at work that day. The witness explained that he and a coworker often clocked in for each other, so the timecard would indicate he was at work at times when he was not. (*Allen and Johnson*, *supra*, 53 Cal.4th at p. 64.) During deliberations, one of the jurors told the others, " 'That's a lie. I know Hispanics, they never cheat on timecards, so this witness . . . was at work, end of discussion.' " (*Id.* at p. 66.) The Supreme Court concluded, "Juror No. 11's remark did not constitute misconduct. His positive opinion about the reliability of Hispanics in the workplace did not involve specialized information from an outside source. It was an application of his life experience, in the specific context of timecards and the workplace, that led him to conclude Connor was not telling the truth about the shootings. Juror No. 11 simply found unconvincing Connor's excuse as to why his timecard indicated he was elsewhere." (*Id.* at p. 78.)

In *People v. Steele* (2007) 27 Cal.4th 1230, the case cited by the trial court here, the jury had received evidence about the defendant's military experience and training during the Vietnam War and expert testimony about neurological testing on him. (*Id.* at pp. 1240–1241.) The defendant claimed misconduct by jurors with military experience who told others it was unlikely the defendant had been exposed to combat in Vietnam, and by jurors with experience in the field of medicine who stated that the validity of one of the neurological tests had not been adequately established. (*Id.* at pp. 1259–1260.) The court found no misconduct, explaining that "[a]ll the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. . . . A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that

evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence." (*Id.* at p. 1266, italics added.) *In re Lucas*, *supra*, 33 Cal.4th at pages 694–696, found no misconduct where a juror who was a former drug addict and alcoholic said in deliberations that the defense based on extreme intoxication was not credible because " 'I've seen a lot of people use drugs, and I've never seen them do what this man had done.' "

As the trial court found, the juror or jurors' statements in deliberations about the newspaper on the windows of unit 2 did not introduce "specialized information from an outside source" but simply applied the jurors' "life experience" to reach an interpretation of the evidence produced at trial. There was no misconduct.

II.

Randt next contends the trial court erred in refusing to instruct the jury on the time within which a landlord must move into a unit.

In 2014, section 37.9, subdivision (a)(8)(v), provided: "It shall be rebuttably presumed that the landlord has not acted in good faith if the landlord or relative for whom the tenant was evicted does not move into the rental unit within three months and occupy said unit as that person's principal residence for a minimum of 36 continuous months." (See S.F. Ord. No. 218-14.)[7]

Randt asked the trial court to give a jury instruction on this presumption. The court refused, explained that if viewed as a presumption affecting the burden of producing evidence, the presumption would disappear because respondents had presented conflicting evidence, while if viewed as a presumption affecting the burden of proof, the

[7] This provision is no longer part of the Rent Ordinance, which (as amended subsequent to the trial) now provides, "Evidence that the landlord has not acted in good faith may include, but is not limited to, any of the following: . . . [¶] . . .[¶] (2) the landlord or relative for whom the tenant was evicted did not move into the rental unit within three months after the landlord recovered possession and then occupy said unit as that person's principal residence for a minimum of 36 consecutive months . . . ." (S.F. Ord. No. 160-17.) (S.F. Admin Code, § 37.9 (A)(8)(v).)

presumption would be unconstitutional. Subsequently, Randt requested a jury instruction stating, "A landlord must move into the apartment after recovery of the possession and live continually in the apartment for a period of 36 months." Denying this request, the court stated that the Rent Ordinance does not require the landlord to move in within three months, only that he or she have a good faith intent to live in the unit for three years.

During deliberations, the jury asked the court, "Does the owner move-in date matter? Do we have a law to consider that states when an owner move-in needs to happen upon recovery of the unit?" Randt's attorney suggested a response based on Civil Code section 1657, which provides that "[i]f no time is specified for the performance of an act required to be performed, a reasonable time is allowed." Respondents' counsel suggested the jury should be told that the law does not provide a specific time frame for the owner to move in, arguing that even landlords who never move in could have complied with the Rent Ordinance if they had a good faith intent to move in but events in their lives prevented them from doing so. The court told the jury that "[t]here is no specific requirement that an owner move-in must happen by a specific date after recovery of possession."

One of the trial court's reasons for refusing to instruct the jury on the presumption then contained in section 37.9, subdivision (a)(8)(v), was its view that the presumption was likely invalid under the reasoning of *Rental Housing Assn. of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, 757 (*Rental Housing*). *Rental Housing* addressed a provision in the Oakland rent control ordinance stating that an owner move-in "shall be a presumed violation" where continuous occupancy is less than 36 months. (*Ibid.*) The court found the presumption was preempted by Evidence Code section 500, which provides that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." *Rental Housing* explained that the presumption would arise only in a tenant's posteviction suit against the landlord for violation of the ordinance, in which the tenant

bears the burden of proof under Evidence Code section 500, and the presumption impermissibly shifted that burden to the landlord. (*Rental Housing*, at p. 757.) [8]

Randt argues that the presumption at issue here only affects the burden of producing evidence, not the burden of proof, because it is rebuttable. He points to Evidence Code section 604, which states, "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." The *Rental Housing* court concluded that the presumption there was not merely one affecting the burden of proof because its wording was not "consistent with or similar to" the language of Evidence Code section 604 in that there was no language in the ordinance provision that "restricts or nullifies the operative effect of its presumption in the face of contrary evidence." (*Rental Housing*, at p. 758.) Randt argues that because the provision in the present case states that the presumption is rebuttable, it implies that "evidence can be offered that does restrict or nullify the operative effect of the presumption, just as Evidence Code section 604 dictates."

Rental Housing followed the reasoning of *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644 (*Fisher*), regarding classification of a presumption as affecting the burden of producing evidence or the burden of proof. *Fisher* explained that "[a] presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) The code makes clear that the purpose of such a rebuttable presumption relates solely to judicial efficiency, and does not rest on any public policy extrinsic to the action in which it is invoked. . . . "The burden of proof,

[8] As the trial court noted, the rebuttable presumption in the Rent Ordinance was challenged as impermissibly conflicting with Evidence Code section 500 in *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1596–1597 and, although we found it unnecessary to decide the issue, we commented that the argument had "some force."

on the other hand, refers to a party's obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. (Evid. Code, § 115.) Unlike presumptions affecting the burden of producing evidence, which exist merely to expedite resolution of disputes, '[a] presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property . . . .' (Evid. Code, § 605.) The purpose of such a rebuttable presumption relates to public policy goals 'other than or in addition to the policy of facilitating the trial of actions.' (Cal.Law Revision Com. com. on Evid. Code, § 605.)" (*Fisher*, at pp. 694–695.)

As should be clear from the fact that the discussion in *Fisher* expressly addressed *rebuttable* presumptions in both categories, the distinction between presumptions affecting the burden of producing evidence and those affecting the burden of proof does *not* turn on whether the presumption is rebuttable. A presumption affecting the burden of producing evidence enables the proponent to establish a prima facie case unless rebutted by evidence "supporting the nonexistence" of the presumed fact by a preponderance of the evidence. (*Fisher, supra*, 37 Cal.3d at p. 695.) A rebuttable presumption affecting the burden of proof "shift[s] the ultimate responsibility of persuasion" to the opposing party. (*Id.* at p. 696.) The test turns on both the language and the purpose of the presumption. (*Id.* at pp. 694–697.) As *Fisher* further explained, " '[frequently], presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence." (*Id.* at p. 695, quoting Cal.Law Revision Com. com. on Evid. Code, § 605.)

The presumption upon which Randt sought to have the jury instructed, as the trial court indicated, was one affecting the burden of proof. No language in the version of section 37.9, subdivision (a)(8)(v), applicable at trial suggested the presumption was to be disregarded if evidence was introduced supporting a finding of the nonexistence of the presumed fact. (Evid. Code, § 604.) The provision stated that if the underlying facts were established, the presumed fact—absence of good faith—was to be presumed unless rebutted, shifting the burden of proof by requiring the landlord to prove good faith. The presumption supports a policy beyond expediting resolution of the case—the policy of protecting tenants against eviction in violation of the Rent Ordinance. The trial court correctly refused to give this instruction.[9]

Contrary to Randt's assertion, the jury was never instructed that "there is no obligation under the law for a landlord to move into a unit following an OMI [owner move-in]."[10] It was instructed that "[t]here is no specific requirement that an owner move-in must happen by a specific date after recovery of possession." This is a correct statement: The Rent Ordinance specifies no deadline for the move in. Randt argues the trial court should at least have instructed, pursuant to Civil Code section 1657, that

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[9] Randt states that due to the court's refusal to instruct on the presumption, respondents were "able to make the argument, misstating the law, that the respondents had no obligation to move into the subject unit within any timeframe or at all." The record citations supporting this statement are not to argument made to the jury but rather to argument *to the court* about how to respond when the jury asked during deliberations whether the law specified a time requirement for an owner move-in.

[10] Randt asserts, unpersuasively, that the court's failure to instruct that a landlord "must actually move in following an OMI essentially created a loophole in the Rent Ordinance that would allow landlords to terminate a rent-controlled tenancy by stating that they intend to move in, then leave the unit vaca[nt] for a period of time before re-renting it." Putting aside the inapplicability of this point to the facts of the present case, in which the landlords undisputedly did move into the unit, a landlord's failure to move in would be compelling evidence of a lack of the good faith and honest intent that the Rent Ordinance requires. While the burden of proving the landlord's lack of good faith would be on the evicted tenant (as discussed above), a landlord who offered no explanation of such conduct would be unlikely to obtain a jury verdict finding he or she acted in good faith.

respondents were required to move into the unit within a reasonable time. But, as the trial court indicated, the Rent Ordinance does not *require* a landlord who has given notice of an owner move-in eviction in good faith and with honest intent move into the unit—although the obvious intent and expectation of the ordinance is that the owner will do so. Instead, the Rent Ordinance treats an owner's delay in moving into the unit, or failure to do so, as an indication that he or she has not in fact sought recovery of the unit in good faith. As respondents' counsel argued to the court below, there may be circumstances in which a landlord who fully and in good faith intends to occupy the unit is prevented from doing so for a period of time, or even at all, by circumstances in his or her life.[11] Such cases may be uncommon, but they are not precluded by the Rent Ordinance. As Civil Code section 1657 applies when an act is "required to be performed," the trial court did not err in declining to instruct the jury on this principle.

Randt's assertion that the trial court's ruling "left the jury with no choice but to find no liability" is also incorrect. As Randt maintains, it was undisputed that respondents did not move in until at least four months after recovery of possession, and the tenants presented evidence that they did not move in until much later. This evidence properly bore on the question whether respondents sought to recover Randt's unit in good faith and with honest intent, as required by the Rent Ordinance, as an owner's delay in moving into the unit, or failure to do so, may well reflect an absence of good faith. The jury was properly instructed that for an owner or relative move-in, "[t]he landlords are required to seek to recover possession in good faith, without ulterior reasons and with honest intent, and the landlords' recovery of possession to use as a principal residence must be the landlord's dominant motive." The tenants presented evidence supporting

[11] Amendments to the Rent Ordinance since trial make this clear by listing as potential evidence that a landlord has not acted in good faith not only that the landlord "did not move into the rental unit within three months" of recovery of possession but also that the landlord "lacks a legitimate, bona fide reason for not moving into the unit within three months after the recovery of possession and/or then occupying said unit as that person's principal residence for a minimum of 36 consecutive months." (S.F. Admin. Code, § 37.9, subd. (a)(8)(v).)

inferences that respondents were not acting in good faith; respondents presented evidence to the contrary. The jury did not find the tenants' evidence sufficiently compelling with respect to Randt's unit. It was not prevented from reaching the opposite conclusion.

III.

A.

Randt challenges several of the trial court's evidentiary rulings. The first is the court's admission into evidence of a photograph that had not previously been produced in discovery. Exhibit W1 was described by Lam as a "selfie" taken by Wong of herself, in unit 2 at Balboa, modeling a bridesmaid dress for her cousin's wedding in January 2015.[12] Randt had requested production of "documents," defined as including photographs, "evidencing [respondents'] principal place of residence" as of the first of the month of August, October, and December 2014 and February, April, June, August and September 2015, in a request for production of documents dated September 8, 2015, and notices of deposition for Wong in October 2015 and April 2016 and, in notices of deposition for Wong and Lam in April 2016, for documents, including photographs, "evidencing your physical presence at 4441 Balboa."[13] At their depositions in October 2015 and April 2016, respondents had been asked specifically about photographs

[12] Randt's opening brief also addresses the admission of two photographs (exhibit W2), selfies taken in unit 2 that showed Wong's "baby bump" and Lam estimated were taken in late May or early June of 2016, but his reply brief discusses only exhibit W1. Respondents' baby was born in June 2016. The trial court found these photographs were directly relevant to the timing of respondents' living in unit 2 and ruled that their probative value exceeded any prejudice. The photographs were taken long after the time period most contested in this case—the period from December 2014, when respondents said they moved in, to June 2015, when the notice of eviction was served on DeLisi and Pitre.

[13] Respondents assert that Randt never specifically requested production of the photograph of Wong upon which this contention is based, which they erroneously refer to as "Exhibit L." They claim that the notice of Wong's deposition did not include photographs from inside the Balboa building among its 54 requested items, but in fact cite to a July 2016 notice to produce documents. As indicated above, the notice of Wong's October 2015 deposition clearly does include such photographs.

showing them at the Balboa apartment. Randt argues he was prejudiced by the court's admission of the photograph, produced for the first time at trial, because it was the only demonstrative evidence showing that respondents were living in unit 2. According to Randt, without the photograph, the jury would have decided in his favor because of the "dearth" of evidence supporting respondents' testimony that they moved into the apartment and lived there as their principal residence.

When respondents sought to introduce the photograph, Randt's attorney argued it should be excluded because the surprise introduction was unfair after respondents failed to produce exhibit W1 despite multiple discovery requests. The trial court ruled the photograph would be admissible upon proper foundation. The trial court viewed exhibit W1 as probative on the issue of when respondents lived in the unit and not prejudicial. The court directed counsel to advise it if there had been a specific request for production covering this photograph, and counsel filed a brief that quoted portions of the depositions in which respondents were asked about photographs and attached the requests for production of documents. The court subsequently noted that the requests for documents were very general, Wong stated she could not remember when she last took photographs in the apartment, and there had been no motion to compel. The court found there was no willful failure to comply with discovery or attempt to "hide or sandbag."

The trial court's evidentiary ruling is reviewed for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1.) Randt must show not only that the court's decision was "arbitrary, capricious, or patently absurd," but also that it "resulted in a manifest miscarriage of justice." (*Id.* at pp. 9–10.)

The photograph was clearly probative; the only possible issue was whether respondents willfully withheld it and Randt was prejudiced by its late appearance. Randt likens his case to *Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1453–1455. The plaintiffs in that case objected when the defendants' witness at trial referred to documents that the plaintiffs claimed had not been disclosed despite the defendants' representations that they had produced all relevant documents. (*Id.* at p. 1452.) The trial court found that the defendant had " 'played fast' with the discovery rules" and "made an

'absolute and deliberate attempt to thwart discovery for the purpose of gaining a tactical advantage at . . . trial.' " (*Id.* at pp. 1453, 1454.) On appeal, the defendants' challenged the trial court's sanction, not its finding of discovery abuse. (*Id.* at pp. 1454–1456.)

The present case is in the opposite posture: The trial court declined to find a willful abuse of the discovery process warranting exclusion of the photograph. Neither the requests for production nor the deposition excerpts Randt provided to the trial court undermine its conclusion that respondents did not *willfully* fail to produce the photograph of Wong. The broad request for documents "evidencing your physical presence" at the Balboa apartment would not *necessarily* trigger memory of every photograph taken, especially one taken to document the dress Wong was wearing rather than the location. Nor would the deposition question whether Wong had "pictures of your apartment generally inside of Balboa." Lam's statement that he had provided all the pictures he had taken at the apartment on his phone was not necessarily intentionally misleading; exhibit W1 was a "selfie" taken on Wong's phone. Respondents apparently produced other photographs taken at the apartment in the same time frame as the one of Wong, and the trial court made a credibility determination in concluding the omission of this one was not a willful failure to comply with discovery. We recognize that Randt could not have requested discovery of a specific photograph he did not know existed (as he points out), but this does not mean respondents willfully failed to produce the photograph. In short, we have no basis for finding the court abused its discretion.

Furthermore, Randt is incorrect in asserting that this photograph was the only demonstrative evidence supporting respondents' testimony as to the timing of their residence in the Balboa apartment. Other evidence included, for example, receipts for Lam's Uber rides to and from the apartment, Pacific Gas & Electric bills for utility usage there, and the Comcast bill showing the Balboa address. Randt has not demonstrated that this one photograph was so compelling as to make it reasonably probable its exclusion would have resulted in a verdict in Randt's favor.

B.

Randt next challenges the trial court's exclusion of evidence of the availability of Chan's apartment. As earlier noted, on August 1, 2014, a few days before Randt moved out of unit 2, Chan gave 30 days' notice of his intent to move out of unit 3; Randt asked Lam to rescind his eviction but Lam declined to do so. Lam testified he did not offer the unit to Randt because the unit was not vacant on August 1.

Under section 37.9, subdivision (a)(8)(iv), "[a] landlord may not recover possession under this Section 37.9(a)(8) if a comparable unit owned by the landlord is already vacant and is available, or if such a unit becomes vacant and available before the recovery of possession of the unit." At the conclusion of the tenants' case in chief, the trial court granted respondents' verbal motion for nonsuit on any issues under this provision because the tenants' evidence showed Chan's unit was not vacant before respondents recovered possession of unit 2. The court ordered that there be no mention of these issues and later gave the following jury instruction: "Evidence and testimony has been received concerning the alleged notice of vacancy of George Chan in Unit 3 in August of 2014. [¶] There is no issue in this case concerning the lawfulness of the vacancy in Unit 3. [¶] You shall and must disregard any evidence and testimony concerning the alleged vacancy in Unit 3. You shall not consider any such evidence or testimony when making any decision in this matter. [¶] You must disregard the testimony of Bill Randt regarding any request to rescind his eviction to the extent that it was based on the alleged notice of vacancy in Unit 3."

Randt acknowledges that the trial court was correct in rejecting his attempt to show that another unit was vacant and available while he was still in possession of his unit. He argues, however, that there were other grounds for admission of testimony regarding Chan's unit and of his email asking Lam to rescind his eviction, which was redacted to remove reference to Chan leaving unit 3. Specifically, he argues that the evidence was relevant to respondents' motivation and good faith under the Rent Ordinance, and that exclusion of the evidence was prejudicial to his case. Randt maintains that he wanted to argue, as he indicated below, that although respondents were

not required by law to offer Chan's unit to him, their refusal to do so and subsequent rental of the unit for a higher rent was evidence of respondents' ulterior motive and lack of good faith in evicting Randt.

The trial court did not address this alternative view of the evidence. Given that Chan left unit 3 voluntarily and unexpectedly, however, it is difficult to view Lam's refusal to rescind Randt's eviction as evidence of bad faith. Not only was there no legal requirement that Lam offer Chan's unit to Randt (or, as Randt suggests, move into Chan's unit and allow Randt to stay in unit 2), we are hard-pressed to imagine a juror viewing Lam's decision as anything other than a business decision. It is only to be expected that one who purchases a multi-unit apartment building hopes and intends to make money from the acquisition. Nothing in law or ethics precluded respondents from taking advantage of the opportunity presented by a fortuitous vacancy they had nothing to do with creating.

In order to find that respondents acted in good faith and with honest intent in serving notice of their owner move-in to unit 2, the jury must have believed either that respondents moved in when they said they did, or that their failure to move in until after the present lawsuit was filed did not demonstrate that they lacked good faith and honest intent in filing the eviction notice. In either case, we see no reasonable probability the jury would have reached a contrary decision if it had learned that Lam declined to allow Randt to remain after Chan gave notice that he was voluntarily moving out of unit 3.

C.

At her deposition in February 2016, DeLisi stated that Lam "asked if I had ever thought about relocating. And then he went on to state that if I was, and he said that if I was wanting to move out, he would make it worth my while financially to move out of the building.' " Randt argues that the trial court erred in excluding evidence of this statement pursuant to Evidence Code section 1152. Subdivision (a) of this statute provides: "Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money . . . to another who has sustained or will sustain . . . loss or damage, as well as any conduct or statements made in negotiation

thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it." (Evid. Code, § 1152, subd. (a).) The court permitted evidence that Lam asked DeLisi if she was thinking about moving without reference to the financial offer. At trial, DeLisi testified that shortly after taking ownership of the building, Lam asked to speak with her and, when they met, asked if, "considering that I was teaching in Oakland, if I ever was interested in moving to Oakland."

Randt argues that Lam's offer to DeLisi does not come within the purview of Evidence Code section 1152 because it was not made in settlement negotiations and did not involve existing or impending litigation. Alternatively, he argues that even if the offer was considered part of a settlement discussion, Evidence Code section 1152 does not preclude admission for a purpose other than to prove liability. He maintains that Lam's offer of a buy-out was relevant to the question of Lam's motive and good faith in evicting Randt, describing it as a "critical piece of evidence" showing that within a month of two units in the building becoming vacant, Lam was trying to remove the last tenant he could remove from the property (the fourth unit being occupied by protected tenants).

Evidence Code 1152 is "based on the public policy in favor of the settlement of disputes without litigation and [is] intended to promote candor in settlement negotiations: 'The rule prevents parties from being deterred from making offers of settlement and facilitates the type of candid discussion that may lead to settlement.' " (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1475, quoting *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1023.) The language of Evidence Code section 1152 makes clear that it applies to prospective as well as active disputes, as it refers to offers to made " 'to another who has sustained *or will sustain*' " loss or damage. (*Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 222 (*Mangano*).) In *Mangano*, however, the prospective loss was a certainty. *Mangano* involved a suit for retaliatory termination of employment. At the time the plaintiff was fired, the employer proposed a separation agreement under which it pay him a specified sum in exchange for his release of all claims against the employer. (*Id.* at pp. 219–220.) Rejecting the argument that Evidence Code section 1152 applied only to disputes existing at the time

the offer was made, the *Mangano* court explained: "Verity offered money to Mangano when it terminated his employment. At that time, it was a fact that Mangano's termination would cause him to sustain some loss of income. It follows that Verity's offer to compensate him for this prospective loss was inadmissible under Evidence Code section 1152 to show that Verity was liable for this loss." (*Mangano*, at p. 222.)

Here, there is no analogous evidence that Lam's offer was made at a time when "it was a fact" that his action would cause DeLisi to suffer financial loss. There was no existing dispute between Lam and DeLisi. The evidence does not indicate whether the conversation occurred before or after Lam served the eviction notice on Randt; DeLisi testified that both her conversation with Lam and Randt's eviction noticed occurred "shortly after" Lam took ownership. If Lam had already served Randt's notice of eviction, there would have been no basis for an owner move-in to DeLisi's unit, and there is no reason to believe DeLisi had reason to suspect Lam had any other basis for evicting her. If Randt had not yet been served, there would have been no demonstrable basis for expecting that Lam intended to evict DeLisi if she did not accept his offer. Moreover, the evidence was that the offer was conditional: Lam would make it worthwhile to DeLisi *if* she decided she wanted to move. Evidence Code section 1152 pertains to offers to another "who has sustained or will sustain" loss. At the time DeLisi described Lam's offer being made, any expectation that Lam would cause her to suffer a financial loss was entirely speculative, certainly not "a fact" like the loss of income that would necessarily follow from the termination of employment in *Mangano.*

Nevertheless, we fail to see how exclusion of this evidence prejudiced Randt. Randt's view, as we understand it, is that the evidence Lam was willing to pay DeLisi to move out demonstrates that Lam lacked good faith and honest intent in evicting Randt for the purpose of making unit 2 respondents' home for a period of at least three years. But Lam could simply have been exploring DeLisi's intentions for the future so he would know whether a vacancy was likely to arise; or, if Lam had not yet served notice of eviction on Randt, he could have been exploring options to *avoid* eviction even though he intended to move into the building. As Chan did not give notice of his intention to vacate

unit 3 until August 1, we fail to see the factual basis for Randt's suggestion that in offering a "buy out" to DeLisi, Lam was trying to remove "the last tenant that he could remove from the property." Given respondents' evidence that they served notice of eviction for an owner move-in with weeks of taking ownership of the Balboa building, immediately renovated it to create a two-bedroom unit and subsequently moved into the unit, the conflicting evidence that they did not actually move in until many months later than they said was far more probative of Lam's intent with respect to Randt's unit than was the alleged offer to DeLisi.[14]

IV.

Randt's final contentions challenge the award of attorney fees to respondents. First, Randt argues the attorney fees order should be reversed because the pretrial settlement offer respondents' made pursuant to Code of Civil Procedure section 998, which Randt did not accept, was invalid. It is unclear why Randt is pursuing this argument, or why respondents address its merits rather than pointing out its inapplicability to an attorney fee award in favor of defendants who prevailed at trial.

Code of Civil Procedure section 998 provides that if a settlement offer made by a defendant not less than 10 days before trial is not accepted and the plaintiff fails to obtain a more favorable judgment, "the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer." (Code Civ. Proc., § 998, subd. (b), (c)(1).) " 'As a general rule, the prevailing party in a civil lawsuit is entitled to recover its costs. (Code Civ. Proc., § 1032.) However, [Code of Civil Procedure] section 998 establishes a procedure for shifting the costs upon a party's refusal to settle. If the party who prevailed at trial obtained a judgment less favorable than a pretrial settlement

[14] Respondents devote a significant portion of their brief to an argument that Randt was not prejudiced by any error at trial because all his claims against them were barred by the litigation privilege established by Civil Code section 47—in essence, that the trial court should have dismissed the tenants' case at the outset. We have no reason in the present case to consider this argument. We do address it in the related case, *DeLisi v. Lam and Wong* (A151014), in which Lam and Wong are the appellants and raise litigation privilege as a basis for reversing the decision against them.

offer submitted by the other party, then the prevailing party may not recover its own postoffer costs and, moreover, must pay its opponent's postoffer costs . . . ([Code Civ. Proc.,] § 998, subd. (c)(1).)' " (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86, quoting *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798.) "Thus, under [Code of Civil Procedure] section 998 a defendant whose pretrial offer is greater than the judgment received by the plaintiff is treated for purposes of postoffer costs as if it were the prevailing party." (*Scott v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1112.)

Here, respondents were the prevailing parties without reference to Code of Civil Procedure section 998; they were simply entitled to costs pursuant to section 1032. Nor was section 998 necessary for their recovery of attorney fees: The costs recoverable pursuant to section 998 include attorney fees *"if there is a contractual or other statutory basis for them*" but section 998 "does *not* independently create a statutory right to attorney fees." (*Ford Motor Credit Co. v. Hunsberger* (2008) 163 Cal.App.4th 1526, 1532.)

Randt's second argument is that the attorney fees order should be reversed in its entirety, or reduced, because one of the provisions of the Rent Ordinance respondents relied upon in requesting attorney fees allows only prevailing plaintiffs, not prevailing defendants, to recover attorney fees. Respondents sought attorney fees under sections 37.9 and section 37.10B. Section 37.9, subdivision (f), provides that in a civil proceeding challenging a landlord's wrongful attempt to recover possession in violation of sections 37.9 and/or 37.10A, "[t]he prevailing party shall be entitled to reasonable attorney's fees and costs pursuant to order of the court." Section 37.10B, subdivision (c)(5), provides that in a suit for violation of the ordinance's tenant harassment provisions, "a prevailing *plaintiff* shall be entitled to reasonable attorney's fees and costs pursuant to order of the court." Randt argues that because the claims under the two sections of the Rent Ordinance were intertwined, the attorney fees provision of section 37.10B, subdivision (c)(5), precludes an award of fees to a prevailing defendant under section 37.9, subdivision (f).

Section 37.10B, subdivision c)(5), is a "unilateral fee-shifting provision" that does not permit a prevailing *defendant* to recover attorney fees. (See *Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 503 (*Carver*).) Such nonreciprocal provisions "are created by the Legislature as a deliberate stratagem to encourage more effective enforcement of some important public policy." (*Wood v. Santa Monica Escrow Co.* (2007) 151 Cal.App.4th 1186, 1191; *Carver,* at p. 504.) "The statutory language authorizing fee awards only to prevailing plaintiffs reflects a determination that prevailing defendants should *not* receive a fee award for hours spent defending such claims." (*Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1060 (*Turner*).)

When there is "inextricable overlap" between claims subject to a unilateral attorney fees provision and claims for which a prevailing defendant ordinarily would be able to recover attorney fees, courts have held that the prevailing defendant may not be awarded fees. (*Turner, supra,* 193 Cal.App.4th at p. 1071 [unilateral fees in private actions for damages for violations of civil rights and disability discrimination; bilateral fees in private action for injunctive relief]; *Carver, supra,* 119 Cal.App.4th at p. 504 [unilateral fees for antitrust claims; bilateral fees for contract claims]; *Wood v. Santa Monica Escrow Co., supra,* 151 Cal.App.4th at p. 1191 [unilateral fees for elder abuse claims; bilateral fees for other tort claims].) Allowing prevailing defendants to recover attorney fees for work on claims subject to a unilateral fee provision would frustrate the legislative intent because it might "lead to fewer lawsuits and less effective enforcement," as " '[i]njured people contemplating a lawsuit would confront the prospect of having to pay the defendant's legal fees as well as their own in the event they lost. This would make the bet even less appealing where the potential recovery was modest or where the chances of winning were good but uncertain.' " (*Turner,* at p. 1060, quoting *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d 318, 325–326.) As the court in *Carver* explained, "[t]o allow Chevron to recover fees for work on Cartwright Act issues simply because the statutory claims have some arguable benefit to other aspects of the case would superimpose a judicially declared principle of reciprocity on the statute's

fee provision, a result unintended by the Legislature, and would thereby frustrate the legislative intent to 'encourage improved enforcement of public policy.' " (*Carver*, at p. 504, quoting *Covenant*, at pp. 325–326.)

Randt argues that the same considerations of encouraging enforcement should preclude respondents from recovering attorney fees because the Board of Supervisors, "in enacting the [Rent Ordinance], clearly intended for there to be no fees awarded to a defendant under 37.10B." He points to *Turner, supra*, 193 Cal.App.4th 1047, which involved claims for damages under the Unruh Civil Rights Act and the Disabled Persons Act (DPA) for which attorney fee awards were authorized only for prevailing plaintiffs (Civ. Code, §§ 52, 54.3), and also a claim for injunctive relief under the DPA for which attorney fees are to be awarded to the prevailing party (Civ. Code, § 55). *Turner* considered a number of factors, including the policy issues described above, and concluded that unilateral fee provisions of Civil Code sections 52 and 54.3—which were enacted subsequent to enactment of Civil Code section 55—created an exception to Civil Code section 55 and prohibited a fee award under that statute to a prevailing defendant under that statute for the same hours spent on defending claims under Civil Code sections 52 and 54.3. (*Turner*, at p. 1054.) Randt argues that the unilateral fee provision in section 37.10B of the Rent Ordinance, which was enacted in 2008, should similarly prevail over the bilateral provision in section 37.9 of the Rent Ordinance, which preexisted this enactment.

We disagree. Randt's claims against respondents all derived from the alleged violation of San Francisco Administrative Code section 37.9, subdivision (a)(8), which establishes the requirements for an owner move-in eviction. Section 37.10B, entitled "Tenant Harassment," prohibits a landlord from engaging in specified conduct "in bad faith." The 15 paragraphs of subdivision (a) of section 37.10B describe conduct such as failing to provide required housing services, repairs and maintenance, attempting to influence a tenant to vacate a rental unit through fraud, intimidation or coercion, threatening a tenant with physical harm and interfering with a tenant's privacy. (§ 37.10B, subds. (1), (2), (3), (5), (6), (8), (13), (14).) The only conduct described in this

provision that could have fit the present case is "[i]nterfere with a tenant's right to quiet use and enjoyment of a rental housing unit as that right is defined by California law." (§ 37.10B, subd. (a)(10).) But on the facts of this case, and as alleged in the complaint, the only way in which respondents allegedly interfered with Randt's right to quiet use and enjoyment of his apartment was by unlawfully evicting him through an improper owner move-in. In other words, Randt's claim under section 37.10B was entirely derivative of his claim under the San Francisco Administrative Code section 37.9. Section 37.9, subdivision (f), calls for an award of attorney fees to the prevailing party. Randt's argument attempts to defeat this provision by reliance on a provision that could not have played any independent role in the litigation.

The situation is in a sense the opposite of that in *Turner*. One of the arguments made by the prevailing defendant in that case was that the plaintiffs could have avoided the risk of a fee award in its favor by electing to forego injunctive relief under Civil Code section 55, thus avoiding the bilateral attorney fee provision. *Turner* held this did "not justify, as matter of public policy, a [Civil Code] section 55 fee award to a prevailing defendant that concedes it did not incur even one extra hour of attorney fees defending the section 55 claim. To award fees under section 55 would frustrate the purposes of the unilateral fee-shifting provisions in [Civil Code] sections 52 and 54.3, and in this case impose a crushing fee award on civil rights plaintiffs who did not even seek damages from defendant. Moreover, such an award would also undermine enforcement of section 55, which benefits all disabled persons, by discouraging future plaintiffs from including claims for injunctive relief under section 55, even where inclusion of the claim would not increase the burden of the litigation. It is reasonable to conclude the Legislature intended to discourage the filing of meritless lawsuits under section 55, but there is no reason to believe the Legislature intended to discourage requests for injunctive relief under section 55 that add nothing to the defendant's litigation burden." (*Turner, supra*, 193 Cal.App.4th at p. 1071.)

Here, Randt is attempting to avoid the bilateral fee provision applicable to the central claim in his case, without which none of the other claims would exist, by invoking

the fee provision applicable to an entirely derivative claim that could not have "increase[d] the burden of the litigation." (*Turner, supra,* 193 Cal.App.4th at p. 1071.) The concerns discussed in *Turner* and other cases about undermining a legislative intention to encourage private enforcement in a particular area do not apply in these circumstances. Certainly, the inclusion of a unilateral attorney fee provision in section 39.7B reflects legislative intent to encourage aggrieved tenants to bring their harassment claims to court. But it is clear from the ballot pamphlet for the proposition by which section 37.10B was added to the Rent Ordinance that the fundamental public policy the "tenant harassment" provisions were intended to support was prevention of harassment in the sense of intimidation and coercion undertaken to cause a tenant to vacate a rental unit.[15] Randt's claims were based on an alleged failure to follow the requirements for a valid owner move-in eviction under section 37.9, subdivision (a)(8). The policy objectives of the unilateral attorney fee provision in section 37.10B is not frustrated by an award of fees under section 37.9 in a case based on violation of the requirements imposed by section 37.9 for lawful evictions and lacking any evidence of other harassment.[16]

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[15] Randt's unopposed request for judicial notice of portions of the Voter Information Pamphlet pertaining to Measure M, presented to voters for the November 2008 election, is hereby granted. (Evid. Code, §§ 452, 459; *Vargas v. City of Salina* (2009) 46 Cal.4th 1, 22, fn. 10.)

[16] Randt appears to suggest that respondents are at fault for the allegedly erroneous attorney fee award because they sought attorney fees under both sections 37.9 and section 37.10B, the court "was unaware of the two different fee provisions and awarded respondents fees without consideration of those relating to intertwined work," and respondents "made no effort to separate out fees for each claim."

This attempt to put the onus on respondents is particularly misplaced, as Randt not only failed to object to an award of attorney fees for work on intertwined claims but affirmatively agreed when respondents' asserted section 37.9, subdivision (f), as authority for their fee request. The transcript reflects that the trial court initially focused on the unilateral provision in section 37.10B, to which Randt's brief had pointed, and was then advised by respondents that the applicable provision was section 37.9, subdivision (f). When asked for a response, Randt's attorney agreed that the latter section authorized an award of fees (although he argued against an award for different reasons).

DISPOSITION

The judgment is affirmed.

Costs to respondents.

It was Randt's responsibility to raise the issue of intertwined fees if he wanted to challenge the award on this basis. As he failed to do so, we could, and generally would, consider the issue forfeited. (*Children's Hosp. & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776–777.) We have exercised our discretion to reach the issue here because of its significance and the facts that respondents did not point out the failure to object below and instead addressed the issue on the merits.

_____
Kline, P.J.

We concur:

_____
Stewart, J.

_____
Miller, J.

Randt v. Lam et al. (A151062)